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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE LUIS SAMANIEGO,

Defendant and Appellant.

D048107

(Super. Ct. No. SCD193884)

APPEAL from a judgment of the Superior Court of San Diego County, Robert C. Coates, Judge. Affirmed.

A jury convicted Jose Luis Samaniego¹ of resisting arrest (Pen. Code, § 148, subd. (a)(1)) and flight from a pursuing peace officer with reckless driving (Veh. Code, § 2800.2, subd. (a)). The trial court sentenced Samaniego to probation, with the condition that he serve 181 days in county jail.

¹ Although the parties and the record have referred to the defendant using both his true name and his alias, Michael Lopez, we refer to the defendant by his true name. (Cal. Style Manual (4th ed. 2000) §§ 6.13, 6.24.)

Samaniego appeals, contending that reversal is required because (i) the trial court abused its discretion in overruling an objection to a police officer's testimony that he does not charge anyone unless they "did it"; and (ii) the prosecutor committed misconduct in closing argument by misstating the trial testimony and disparaging defense counsel. After reviewing Samaniego's contentions, we deem them to be without merit and affirm the judgment.

FACTS

Shortly before midnight on September 16, 2005, San Diego Police Officer Jacob Resch observed a blue, two-door Saturn fail to stop at a red light. Resch activated the lights and siren on his marked patrol car and attempted to stop the Saturn. The Saturn did not yield, but instead continued traveling at a high rate of speed and failed to stop at several stop signs. With Resch in pursuit, the Saturn finally came to an "abrupt stop" at a dead end, near a metal barrier.²

From approximately 15 feet away, Resch observed two persons get out of the Saturn and flee the scene; one person exited the driver's side door and the other person exited the front passenger's side door. The driver looked "right at" Resch before fleeing. Due to the combination of street lighting and the spotlights on Resch's patrol car, the Saturn was well lit as the persons fled. Resch thought the driver "looked familiar" but was not "100 percent sure." A third person, Jorge Soto, then exited from the back seat of the Saturn and was stopped by Resch. Soto appeared to be intoxicated.

² The Saturn came to a stop approximately 120 yards from Samaniego's apartment.

Neither the driver nor the passenger were located after a brief search of the area by other officers. Soto, however, made a statement to Resch that led Resch to believe that the registered owner of the car was the driver.³

When Resch returned to the police station, he obtained a computerized photograph from the Department of Motor Vehicles database of the registered owner of the Saturn — Samaniego. Resch viewed the photograph approximately 35 minutes after having viewed the driver, and was "completely sure" that the person pictured (Samaniego) was the driver. Resch also recalled having previous contacts with Samaniego. Resch informed his colleague, Detective Felix Aguirre, of the events that had transpired and that he had identified Samaniego as the driver.

Samaniego later came to the police station to retrieve the Saturn, which had been impounded. While at the station, Samaniego spoke with Detective Aguirre. Samaniego told Aguirre that he was "'the only one who drives'" the car, but that he had not driven it on the night of September 16. Samaniego explained that he had fallen asleep at a party that night and when he awoke, the car was gone. Asked about the car keys, Samaniego informed Aguirre the keys were "with the car."

³ In light of a defense objection to Soto's statement on hearsay grounds, the trial court did not permit the prosecution to introduce the statement itself, and instructed the jury that references to the statement were permitted solely to explain Resch's further investigation, not as evidence of the truth of any information conveyed by Soto to Resch.

The defense presented the testimony of Eliso DeLacruz. DeLacruz testified that he was with Samaniego at a party on the night of September 16 and drove Samaniego home because someone had taken Samaniego's car.

DISCUSSION

I

Reversal Is Not Warranted Based on Resch's Testimony that He Was "Serious" About His Job and Did Not Charge People Unless "They Did It"

Samaniego contends that the trial court improperly permitted Resch to testify to what amounted to a personal opinion that Samaniego was guilty. Samaniego argues this testimony was irrelevant and unduly prejudicial, requiring reversal. We evaluate this contention after setting forth the pertinent testimony.

A. *Pertinent Background*

During his testimony on direct examination, after identifying Samaniego in court as the driver of the Saturn, Resch gave the following testimony:

"Q. Now, sir, as a police officer, who is involved in charging crimes, do you recognize the significance of accusing somebody of a crime?

"A. Yes, I do.

"Q. And is that something that you would take lightly?

"A. I'm very serious about my job. I've been serious my whole career. I learned it from my dad, who was serious about his job for 30 years. It's not something I take lightly. I don't charge somebody unless I know they did it."

Defense counsel objected, and moved to strike the officer's testimony on the ground that it was "not relevant . . . to the jury's decision." The court overruled the

objection. The prosecutor then followed up with further questions relating to the accuracy of Resch's identification of Samaniego as the driver of the Saturn. On cross-examination, defense counsel attempted to demonstrate that Resch's identification was not credible.

B. *The Trial Court Did Not Abuse Its Discretion in Overruling Samaniego's Relevance Objection*

Samaniego first contends that Resch's testimony was irrelevant and the trial court abused its discretion in refusing to strike it. We disagree.

The inquiry with respect to relevance is simply whether the evidence had "any tendency in reason" to prove or disprove disputed facts. (Evid. Code,⁴ § 210 ["'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness . . . , having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action"].) Given this permissive threshold, we cannot conclude the trial court *abused its discretion* in overruling the relevance objection. (*People v. Garceau* (1993) 6 Cal.4th 140, 177 ["The trial court retains broad discretion in determining the relevance of evidence"].)

Resch's identification of Samaniego as the driver of the Saturn was the central disputed fact at trial. Resch's testimony that he did not "lightly" identify Samaniego as the driver of the Saturn, and even his embellishment of that answer by reference to his father's police service, were relevant both to indicate the degree of certainty of Resch's

⁴ All further statutory references are to the Evidence Code unless otherwise specified.

identification and to support the credibility of Resch's testimony regarding the performance of his duties on September 16 and his subsequent investigation. (See CALCRIM No. 315 [listing as a factor that the jury may consider in determining the weight to give to eyewitness identification: "How certain was the witness when he or she made an identification?"].) That the evidence was only marginally relevant on these points does not alter the relevance analysis.⁵

C. *The Testimony Does Not Constitute Error as Improper Prosecutorial Vouching*

On appeal, Samaniego for the first time raises two alternative objections to the testimony.⁶ First, Samaniego contends that Resch's testimony constituted improper vouching by offering a "personal belief" as to the defendant's guilt. In making this argument, Samaniego draws an analogy to cases where courts have disapproved a *prosecutor's* expression of a personal belief in a defendant's guilt, where the implication of the prosecutor's statement is that a finding of guilt is supported by evidence "other than evidence adduced at trial." (See *People v. Bain* (1971) 5 Cal.3d 839, 848.) The analogy has little application here, however.

⁵ As we conclude that the trial court did not abuse its discretion in overruling the relevance objection, we consequently disagree with Samaniego's contention that the trial court's actions resulted in a violation of Samaniego's federal constitutional rights. (See, e.g., *People v. Marlow* (2004) 34 Cal.4th 131, 152 [where trial court did not abuse its discretion in relevance ruling, there was no constitutional error].)

⁶ The absence of an objection on these grounds in the trial court results in a forfeiture of the claims on appeal. (*People v. Cook* (2006) 39 Cal.4th 566, 607.) However, because Samaniego also contends that his counsel's failure to raise these alternate grounds for objection constituted ineffective assistance of counsel, we address the alternate grounds despite the forfeiture.

In the instant case, the alleged improper vouching was neither made by a prosecutor, nor did it suggest the existence of extra-record evidence supporting Samaniego's guilt. (See *People v. Frye* (1998) 18 Cal.4th 894, 971 ["A prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony *by referring to evidence outside the record*. [Citations.] Nor is a *prosecutor* permitted to place the prestige of her office behind a witness by offering the impression that she has taken steps to assure a witness's truthfulness at trial," italics added].) Resch's comment expressing a personal belief in Samaniego's guilt (that he "did it") was that of an *eyewitness* to the crime, and came at the conclusion of exhaustive testimony by that eyewitness laying out exactly why, based on evidence presented to the jury (e.g., Resch's ability to view Samaniego, his previous contacts with him, his certainty that Samaniego was the person he saw), the witness believed Samaniego to be the perpetrator. Given these circumstances, we disagree that Resch's testimony should have been excluded as improper vouching under the case law cited by Samaniego.⁷ (Cf.

⁷ Samaniego highlights a recent case in which our colleagues in the Second District found improper prosecutorial argument where the prosecutor stated, "*I have a duty and I have taken an oath as a deputy District Attorney not to prosecute a case if I have any doubt that that crime occurred.*" (*People v. Alvarado* (2006) 141 Cal.App.4th 1577, 1583.) Viewing this comment in concert with other comments during closing argument, the Second District concluded that "[t]he only reasonable inference from the[prosecutor's argument] is that (1) the prosecutor would not have charged Alvarado unless he was guilty, (2) the jury should rely on the prosecutor's opinion and therefore convict him, and (3) the jurors should believe [a prosecution witness] for the same reason." (*Id.* at p. 1585.) The instant case is distinguishable because here, the reasonable inference from Resch's testimony was not that the jury should rely on Resch's opinion of Samaniego's guilt because Resch was a law enforcement officer, but rather that the jury should rely on

Frye, at p. 971 ["so long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the 'facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief,' her comments cannot be characterized as improper vouching"].)⁸

D. *Samaniego Fails to Demonstrate that His Counsel's Reliance Only on Relevance as Grounds for the Objection and Not Section 352 Constituted Ineffective Assistance of Counsel*

Samaniego also contends that Resch's comments should have been excluded under section 352, which permits a trial court to exclude relevant evidence where the probative value of the evidence is substantially outweighed by a risk of undue prejudice or misleading the jury. Samaniego argues that even though he did not cite section 352 in the trial court, reversal is required on this ground because his counsel's failure to do so constituted ineffective assistance of counsel.

Resch's opinion that Samaniego was guilty because Resch (unlike the prosecutor in *Alvarado*) was *an eyewitness to the crime*.

⁸ The sole case cited by Samaniego in which a court addressed improper vouching by a prosecution *witness* is distinguishable. In *U.S. v. Rudberg* (9th Cir. 1997) 122 F.3d 1199, 1204, the court found vouching error where "several" witnesses, including an FBI agent, suggested that the testimony of a number of cooperating informants was truthful due to a court-supervised sentencing process, a sentiment reemphasized by the prosecutor in closing argument. The Ninth Circuit determined this was reversible error because it "impl[ied] the existence of an extra-record verification" process that established the truth of the informants' testimony. (*Id.* at p. 1205.) Here, unlike in *Rudberg*, there was no implication of extra-record verification of Resch's testimony; the alleged vouching consisted of an eyewitness emphasizing his own confidence *based on facts presented to the jury* that his identification of Samaniego was accurate.

To obtain relief on the ground of ineffective assistance of counsel, a defendant has the burden of establishing both counsel's deficiency and resulting prejudice, i.e., (i) that "'counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms,'" and (ii) "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" (*In re Fields* (1990) 51 Cal.3d 1063, 1069, 1070, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 688, 694.)

Here, we need not resolve whether counsel's failure to cite section 352 in his objection to Resch's testimony was deficient, because the failure to do so did not sufficiently prejudice Samaniego to warrant reversal. (*In re Fields, supra*, 51 Cal.3d at p. 1079.) As discussed above, unlike the cases cited by Samaniego to support the contention that Resch's comments constituted prejudicial vouching, the testimony here consisted of an *eyewitness* asserting *his own* firm belief in the defendant's guilt. The basis for Resch's personal belief was not some unspecified nonrecord evidence, but rather consisted of the very testimony that Resch gave at trial — that Resch saw Samaniego flee the Saturn and was confident, based on his recollection and his previous contacts with Samaniego, that his identification of Samaniego was accurate. In addition, the jurors were specifically instructed that they "must not be biased against the defendant because he's been arrested for these offenses, charged with a crime, or brought to trial."⁹ (See

⁹ The trial court also instructed the jurors that they "are the judges of the believability of witnesses" and "the sole judges of the believability of a witness and the weight to be given the testimony of each witness." In addition, defense counsel

People v. Mickey (1991) 54 Cal.3d 612, 689, fn. 17 (*Mickey*) [appellate court is required to "presume that jurors comprehend and accept the court's directions"].) Given these circumstances, there is not a "reasonable probability" that the jury relied on Resch's personal opinion, as opposed to the facts underlying that opinion, and consequently, no reasonable probability that the result would have been different had Samaniego's counsel succeeded in having the personal opinion testimony stricken on section 352 (or other) grounds.¹⁰

II

Alleged Error in the Prosecutor's Closing Argument Did Not Rise to the Level of State or Federal Error

Samaniego also contends that reversal is required because the prosecutor engaged in misconduct in closing argument by misstating the evidence and disparaging defense counsel. We disagree.

A prosecutor's conduct violates the federal Constitution only when it is ""so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."" (*People v. Ledesma* (2006) 39 Cal.4th 641, 726.) "A prosecutor's

emphasized in argument that the jurors in voir dire had agreed that they "would give [a police officer's testimony] no more weight than that of an ordinary civilian."

¹⁰ Due to this absence of prejudice, we would not be permitted to reverse the convictions even if we concluded the trial court abused its discretion in overruling the relevance objection. (§ 353, subd. (b) ["A verdict . . . shall not be set aside . . . by reason of the erroneous admission of evidence unless" the error "resulted in a miscarriage of justice"].)

conduct that does not rise to the level of a constitutional violation will constitute misconduct under state law only if it involves "'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"" (*Ibid.*) Given the nature of closing *argument*, a prosecutor is given wide latitude to vigorously argue his or her case and to make fair comment upon the evidence, including reasonable inferences or deductions that may be drawn from the evidence. (*Ibid.*) The question in evaluating prosecutorial argument is not whether we would prefer that a particular sentiment had been phrased differently, but "'whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.'" (*People v. Ochoa* (1998) 19 Cal.4th 353, 427 (*Ochoa*).)

Samaniego highlights two portions of the prosecutor's closing argument in pressing his claim of prosecutorial misconduct on appeal. In the first, the prosecutor attempted to cast doubt on the testimony of defense witness DeLacruz that Samaniego's car had been stolen on the night of the crime. The prosecutor argued:

"[Defense counsel] began with Mr. DeLacruz, first pointing out there's no evidence before you that Mr. DeLacruz and Mr. Samaniego discussed this case. That was according to counsel. No evidence before you that they discussed it. Is that your recollection, ladies and gentleman? Because it's your recollection that controls, not counsel's, not mine. You are the judges of the facts. That is what you are here to determine. Is that your recollection that there's no evidence that they discussed this case? Think back. What did Mr. DeLacruz testify to? He said, yeah, we discussed it. I don't remember exactly when. Did you discuss it -- did you talk to him after -- after this event occurred? Yeah, I did. He said that. He denied that the defendant told him to call him last night. He made a lot of denials. But, ladies and gentlemen, it is not the case that there is no evidence before you that they discussed this matter."

Samaniego contends this argument was improper because it misstated DeLacruz's testimony; DeLacruz testified only that he had "communicated" with Samaniego since his arrest, and did not state that he had discussed the case with him.

While a prosecutor must not misstate the evidence in closing argument, the argument highlighted here does not rise to the level of error under state or federal law. The prosecutor's argument regarding DeLacruz is at most ambiguous with respect to whether he was suggesting that DeLacruz actually acknowledged discussing the case with Samaniego, or only that the jury should infer that such a discussion occurred from DeLacruz's testimony that they had "communicated." In addition, by virtue of defense counsel's earlier argument and contemporaneous objection, coupled with the trial court's immediate instruction that "[t]he jury will refer to their own recollections," the prosecutor's argument resulted, at most, in an indication to the jury that there was dispute about DeLacruz's testimony on this point. There is no basis to assume the jury resolved this dispute by simply crediting the prosecutor's characterization. The prosecutor stated in the preface to the argument that the jury's recollection of the evidence controls, a sentiment that was repeated by the trial court, and supplemented by an instruction that the jury could, if in doubt about any testimony, request that it be read back to them. (*Mickey*, *supra*, 54 Cal.3d at p. 689 , fn. 17 [appellate court is required to "presume that jurors comprehend and accept the court's directions"].)¹¹ Given these circumstances, there is

¹¹ In addition to the contemporaneous instruction referenced above, the court instructed the jury that "what counsel says is not evidence"; "[s]tatements made by the attorneys during the trial are not evidence"; and the jury "must decide all questions of fact

not "'a reasonable likelihood'" that the jury substituted the prosecutor's recollection of the testimony for its own and thus construed the prosecutor's statements "'in an objectionable fashion.'" (*Ochoa, supra*, 19 Cal.4th at p. 427.)

Samaniego also argues that the prosecutor engaged in improper closing argument when he later discussed the same witness's disinclination to speak to a prosecution investigator. The prosecutor argued in his rebuttal closing argument:

"We had an investigator who was prepared to talk to that witness. He didn't have to come pounding down our door.^[12] The investigator is out there. He's ready to talk to him. He declines. DeLacruz declines. That's not pounding down the prosecutor's door. That's availing yourself of an opportunity. He doesn't want to do it. He could have gone to the prosecution at any time. He didn't have to pound down our door. Counsel says that's just the way it's done. You wait until the trial and you come in and you testify. Yet your friend is accused of a crime that occurred back in September, you don't say anything, and you show up on the day of trial and you testify. Is that how a trial is conducted, ladies and gentlemen, trial by surprise? Surprise."

Again, we do not believe that the prosecutor's statements constitute error. The prosecutor is permitted to attempt to cast aspersions *on a defense witness* by emphasizing that the witness failed to come forward with exculpatory evidence until trial. (See *People*

in this case from the evidence received in this trial and not from any other source." Also, contrary to Samaniego's contention on appeal, the court instructed the jury on two occasions that if it was unsure about any particular testimony it could request a readback of that testimony.

12 Defense counsel had earlier argued that DeLacruz did not "pound down on their doors and say you have an innocent man. . . . Today is the day to do that, in front of you. That's when it's done. [The prosecutor] knows that." The prosecutor objected and the objection was overruled.

v. Tauber (1996) 49 Cal.App.4th 518, 524 ["the fact a witness is aware of the potentially exculpatory nature of facts but fails to reveal that evidence to the authorities before trial is relevant to the witness's credibility"].) Here, this was the clear thrust of the prosecutor's argument. The "surprise" referenced by the prosecutor was, in context, most reasonably interpreted as a permissible reference to the witnesses' failure to come forward until trial, not an impermissible disparagement of the defense counsel's performance. (*Ochoa, supra*, 19 Cal.4th at p. 427.)

In sum, even though the prosecutor ideally would have chosen his words more carefully, whatever fault can be found "it did not render the trial fundamentally unfair. Nor did it amount to a deceptive or reprehensible method of persuasion. Accordingly, it did not constitute misconduct under federal or state standards." (*People v. Gionis* (1995) 9 Cal.4th 1196, 1218-1219.) Consequently, reversal is not warranted.¹³

¹³ Having found that there was no error in the trial proceedings, and the only arguable failing — defense counsel's failure to object to Resch's testimony on section 352 grounds — was not prejudicial, we reject Samaniego's argument that cumulative error during his trial requires reversal.

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

HALLER, Acting P. J.

O'ROURKE, J.